

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Expanding the Economic and Innovation)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	

ORDER DENYING STAY MOTION

Adopted: December 18, 2015

Released: December 18, 2015

By the Chief, Media Bureau:

I. INTRODUCTION

1. On December 11, 2015, The Videohouse, Inc. (Videohouse), Fifth Street Enterprises, LLC (Fifth Street), and WMTM, LLC (WMTM) (collectively Movants) filed an Emergency Motion for Stay and Other Relief (Stay Motion) relating to the deadline for applications to participate in the reverse auction phase of the broadcast television spectrum incentive auction.¹ For the reasons discussed below, we deny the Stay Motion.

II. BACKGROUND

2. In May 2014, the Commission adopted the *Incentive Auction R&O* establishing the framework for the broadcast television spectrum incentive auction.² Among other things, the Commission concluded that the Spectrum Act³ mandates all reasonable efforts to preserve in the repacking process the coverage area and population served of only full power and Class A television facilities (1) licensed as of February 22, 2012; or (2) for which an application for a license to cover was on file as of February 22, 2012.⁴ The Commission interpreted the Spectrum Act, however, to allow it to protect additional broadcast television facilities beyond the statutory floor.⁵ The Commission granted or denied discretionary protection to a handful of categories of facilities, after a careful balancing of numerous factors to achieve the goals of the Spectrum Act and other statutory and Commission goals.⁶

¹ Emergency Motion for Stay and Other Relief filed by The Videohouse, Inc., Fifth Street Enterprises, LLC, and WMTM, GN Docket No. 12-268 (filed Dec. 11, 2015) (Stay Motion). The Stay Motion indicates that Fifth Street acquired WPTG-CD from Abacus Television (Abacus) on October 2, 2015 and is the successor in interest to Abacus. See *id.* at 1 n.4.

² *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 (2014) (*Incentive Auction R&O*), *aff'd*, *Nat'l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015).

³ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 (codified at 47 U.S.C. § 309(j)(8)(G)), 6403 (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012) (Spectrum Act).

⁴ February 22, 2012 is the enactment date of the Spectrum Act. See 47 U.S.C. § 1452(b)(2); *Incentive Auction R&O*, 29 FCC Rcd at 6652-54, paras. 185-89. Through the repacking process, the Commission will reorganize the television bands to make spectrum available to carry out a forward auction of new, flexible-use licenses suitable for providing mobile broadband services.

⁵ *Incentive Auction R&O*, 29 FCC Rcd at 6654-55, para. 191.

⁶ See *id.* at 6655-77, paras. 192-245.

The Commission also explained that reverse auction participation is limited to the licensees of full power and Class A television stations that will be protected in the repacking process.⁷

3. With one exception, the Commission declined to extend discretionary protection to approximately 100 out-of-core Class A-eligible low power television (LPTV) stations that obtained in-core channels but had not filed for their Class A licenses until after February 22, 2012.⁸ The Commission explained that protecting these approximately 100 stations would encumber additional spectrum, thereby limiting the Commission's repacking flexibility.⁹ While the Commission recognized that these stations have made investments in their facilities, it concluded that this does not outweigh the potential harm of protecting them to the Commission's statutory objective of repurposing spectrum through the incentive auction, especially in light of the failure of the licensees to take the necessary steps to obtain a Class A license and eliminate their secondary status during the ten-plus years between passage of the Community Broadcasters Protection Act of 1999 and the Spectrum Act.¹⁰ The Commission decided, however, to protect one station in this category (KHTV-CD) based on its demonstration in response to the *Incentive Auction NPRM*¹¹ as to why it deserved discretionary protection.¹²

4. On September 15, 2014, two of the three Movants (Abacus and Videohouse) filed Petitions for Reconsideration of the *Incentive Auction R&O*.¹³ On June 17, 2015, the Commission dismissed their claims on procedural grounds and, as an alternative and independent ground for its decision, considered and denied the claims on the merits.¹⁴ In its *Reconsideration Order*, the Commission also clarified which Class A stations are entitled to protection in the repacking process. First, it explained that a Class A station that had an application for a license to cover a Class A facility on file or granted as of February 22, 2012 is entitled to mandatory protection.¹⁵ Second, based on a careful balancing of

⁷ See *id.* at 6719, para. 357 (“Parity between repacking protections and reverse auction eligibility will further the goals of the incentive auction. . . . [I]t would be meaningless for us to recognize for relinquishment broader rights than those which we would protect in the repacking process. Unprotected usage rights will not affect our repacking flexibility or our ability to repurpose spectrum and thus will have no value in the reverse auction.”).

⁸ See *id.* at 6670-72, paras. 232-35. The Community Broadcasters Protection Act of 1999 (CBPA), Pub. L. No. 106-113, 113 Stat. Appendix 1 at pp. 1501A-594 – 1501A-598 (1999), *codified at* 47 U.S.C. § 336(f), accorded certain qualifying LPTV stations with “primary” Class A status. “Out-of-core” stations are those that operated on “out-of-core” channels (channels 52-69) when the CBPA was enacted in 1999 and obtained an authorization for an “in-core” channel (channels 2-51). Although the CBPA prohibited granting Class A status to LPTV stations operating on out-of-core channels, it provided such stations with an opportunity to achieve Class A status on an in-core channel. See *Incentive Auction R&O*, 29 FCC Rcd at 6670, para. 232.

⁹ *Incentive Auction R&O*, 29 FCC Rcd at 6671, para. 234.

¹⁰ See *id.*

¹¹ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Notice of Proposed Rulemaking, 27 FCC Rcd 12357 (2012) (“*Incentive Auction NPRM*”).

¹² *Incentive Auction R&O*, 29 FCC Rcd at 6671-72, para. 235 (explaining that KHTV-CD made repeated efforts over the course of a decade to find an in-core channel, had a Class A construction permit application on file certifying that it was meeting the Class A statutory operating requirements prior to February 22, 2012, and filed an application for a license to cover a Class A facility on February 24, 2012, just two days after the Spectrum Act was enacted).

¹³ See Abacus Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 15, 2014) and Videohouse Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 15, 2014) (collectively, the 2014 Petitions). As noted above, Fifth Street, one of the Movants here, acquired WPTG-CD from Abacus subsequent to the filing of the 2014 Petitions. See *supra* n.1.

¹⁴ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Second Order on Reconsideration, 30 FCC Rcd 6746, 6769-75, paras. 53-62 (2015) (*Reconsideration Order*).

¹⁵ See *id.* at 6769, para. 53.

relevant factors, it decided to extend discretionary protection to stations that requested Class A construction permits prior to February 22, 2012.¹⁶

5. On September 2, 2015, Movants and one other licensee, KMYA, LLC (KMYA), filed a Petition for Reconsideration of the *Reconsideration Order* (the Second Reconsideration Petition),¹⁷ which is pending before the Commission. On November 12, 2015, the Media and Wireless Bureaus announced that the filing window for applications to participate in the reverse auction would commence on December 8, 2015 and end on January 12, 2016.¹⁸ The Commission has announced that bidding in the reverse auction will commence on March 29, 2016.¹⁹

6. On December 11, 2015, Movants filed the Stay Motion. They ask for either (1) an extension of the deadline to file applications to participate in the reverse auction pending the Commission's disposition of the Second Reconsideration Petition (any judicial review thereof); or (2) that they be allowed to participate in the reverse auction as currently scheduled, and granted repacking protection pending the Commission's disposition of the Second Reconsideration Petition (and any judicial review thereof).²⁰ Movants state that they will consider the Stay Motion to be denied if no action is taken by December 18, 2015.²¹

III. DISCUSSION

7. In determining whether to stay the effectiveness of one of its Orders, the Commission applies the traditional four-factor test employed by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").²² To qualify for the extraordinary remedy of a stay, a movant must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay. For the reasons described below, we conclude that Movants have failed to meet the test for this extraordinary equitable relief.

¹⁶ See *id.* at 6774-75, para. 62 (explaining that, *inter alia*, "[b]y filing an application for a Class A construction permit prior to February 22, 2012, each of these stations documented efforts prior to passage of the Spectrum Act to remove their secondary status and avail themselves of Class A status.").

¹⁷ See Videohouse, Abacus, WMTM, and KMYA Petition for Reconsideration, GN Docket No. 12-268 (filed Sept. 2, 2015). Petitioners also attached to the Second Reconsideration Petition a copy of each of their Petitions for Eligible Entity Status ("Eligibility Petition") filed July 9, 2015 in GN Docket No. 12-268 in response to the Media Bureau's June 9, 2015 Public Notice. See *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, 30 FCC Rcd 6153 (MB 2015) (announcing each station facility eligible for protection in the repacking process; providing that a licensee can file a Petition for Eligible Entity Status explaining the reason it believes an omitted facility is eligible consistent with the *Incentive Auction R&O*).

¹⁸ *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, AU Docket No. 15-252 et al., DA 15-1296, Public Notice, 2015 WL 7095182 (rel. Nov. 12, 2015).

¹⁹ *Broadcast Incentive Auction Scheduled to Begin on March 29, 2016*, AU Docket No. 14-252 et al., FCC 15-78, Public Notice, 30 FCC Rcd 8975 (2015). On March 29, reverse auction applicants must commit to an initial bid option.

²⁰ See Stay Motion at 2.

²¹ See *id.*

²² See *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Holiday Tours*); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*VA Petroleum Jobbers*).

A. Movants are Unlikely to Prevail on the Merits

8. Movants have failed to demonstrate that they are likely to succeed on the merits. Indeed, most of the arguments they raise have already been considered and rejected by the Commission.

9. First, Movants are unlikely to succeed on their claim that the Commission erred in dismissing the 2014 Petitions on procedural grounds.²³ Movants did not present facts or arguments purporting to support discretionary protection of their stations until after adoption of the *Incentive Auction R&O*, even though all of the facts or arguments put forth in the 2014 Petitions existed at the time the *Incentive Auction R&O* was adopted.²⁴ Contrary to Movants' claim, no other party presented such facts or arguments: rather, the one formerly out-of-core Class A-eligible station (KHTV-CD) that commented on the *Incentive Auction NPRM* provided only specific facts related to its unique circumstances. The comments on which Movants rely asked the Commission to extend protection to Class A stations generally, not to their stations in particular—none mentioned Movants' stations.²⁵ Movants also fail to make the required showing pursuant to Section 1.429(b) of the Commission's Rules,²⁶ and, in any event, their arguments are subject to dismissal as repetitious pursuant to Section 1.429(i).²⁷

10. Second, Movants are unlikely to succeed on their claim that the Commission did not adequately justify its decision to extend discretionary protection to certain Class A-eligible stations but not to Movants.²⁸ Those Class A stations that received discretionary protection sought to avail themselves of Class A status, and demonstrated that they were providing Class A service, prior to enactment of the Spectrum Act,²⁹ the date established by Congress for determining which stations are eligible for repacking protection.³⁰ By contrast, Movants neither requested Class A status, nor demonstrated that they were

²³ Stay Motion at 5-6; Second Reconsideration Petition at 3-5. See 47 C.F.R. § 1.429(b) (a petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission will be granted only under certain circumstances).

²⁴ *Reconsideration Order*, 30 FCC Rcd at 6672-73, para. 59. While Videohouse and Abacus point to various communications they claim they made prior to the adoption of the *Incentive Auction R&O*, these communications either were not filed in the record until later or did not pertain to out-of-core Class A-eligible LPTV stations. Videohouse Eligibility Petition at 3-4; Abacus Eligibility Petition at 2 n.1. See 47 C.F.R. § 1.7 ("documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission").

²⁵ Stay Motion at 6. See Second Reconsideration Petition at 4 n.10.

²⁶ See *supra* n.23.

²⁷ See 47 C.F.R. § 1.429(i) (providing that an "order addressing a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration," but that, except in such circumstance, "a second petition for reconsideration may be dismissed by the staff as repetitious" and that "[i]n no event shall a ruling which denies a petition for reconsideration be considered a modification of the original order").

²⁸ Stay Motion at 6. See Second Reconsideration Petition at 5-7.

²⁹ In the *Reconsideration Order*, the Commission explained that KHTV-CD and each of the other stations in the protected group had filed an application for a Class A construction permit (FCC Form 302-CA) with the Commission before February 22, 2012. See *Reconsideration Order*, 30 FCC Rcd at 6673-74, para. 60, 6774-75, para. 62. That application requires the applicant to certify that it "does, and will continue to" meet all Class A requirements and applicable full power requirements. See *id.* at 6774-75, para. 62. The form provides that willful false statements made in the application are subject to significant penalties. See FCC Form 302-CA, page 6 ("Willful False Statements on this Form Are Punishable by Fine and/or Imprisonment (U.S. Code, Title 18, Section 1001), and/or Revocation of Any Station License or Construction Permit (U.S. Code, Title 47, Section 312(a)(1)), and/or Forfeiture (U.S. Code, Title 47, Section 503)"). See also 47 C.F.R. §§ 73.1015; 73.3513. Thus, as of February 22, 2012, the protected stations had demonstrated that they were operating like Class A stations.

³⁰ 47 U.S.C. § 1452(b)(2). See *Incentive Auction R&O*, 29 FCC Rcd at 6652-53, para. 186 ("The statutory mandate to make all reasonable efforts to 'preserve' coverage area and population 'served' as of a date certain (February 22, 2012) clearly reflects a Congressional intent to protect or maintain facilities operating on this date.").

providing Class A service, until after passage of the Spectrum Act created the potential for Class A status to yield substantial financial rewards through auction participation—and over ten years after the Community Broadcasting Protection Act of 1999 made them eligible for Class A status.³¹ Thus, on the date of enactment of the Spectrum Act, Movants operated LPTV stations. Congress did not include LPTV stations within the definition of broadcast television licensees entitled to protection and auction eligibility,³² and protecting them would significantly constrain the Commission’s repacking flexibility.³³ Movants’ stations are particularly likely to impact repacking flexibility because they are located in the congested markets of Pittsburgh and Washington, D.C. where the constraints on the Commission’s ability to repurpose spectrum through the auction will be greater than in less congested markets.

11. Third, Movants are unlikely to succeed on their claim that the equities weigh in favor of protecting stations that obtained a Class A license by the Pre-Auction Licensing Deadline (May 29, 2015) and met other auction-related filing requirements.³⁴ This approach would arbitrarily extend protection to Movants’ stations and none of the other formerly out-of-core Class A-eligible LPTV stations that obtained in-core channels but had not filed an application for a license to cover a Class A facility or a Class A construction permit until after February 22, 2012. The Commission never linked the Pre-Auction Licensing Deadline to repacking protection for out-of-core Class A-eligible LPTV stations.³⁵ On the contrary, the Commission plainly stated that it would *not* protect such stations based on their obtaining Class A licenses by that deadline.³⁶ By contrast, the February 22, 2012, date adopted in the *Reconsideration Order* is tied directly to the date established by Congress for auction eligibility and repacking protection.³⁷

12. Movants attempt to buttress their claim that the equities weigh in favor of protecting their stations by questioning the validity of the statement in the *Incentive Auction R&O* that approximately 100

³¹ *Reconsideration Order*, 30 FCC Rcd at 6774-75, para. 62. See *Blanca Tel. Co. v. FCC*, 743 F.3d 860, 865-66 (D.C. Cir. 2014) (concluding that the Commission reasonably differentiated among the parties on the basis of their relative diligence in coming into compliance with hearing aid compatibility requirements).

³² 47 U.S.C. § 1401(6) (defining “broadcast television licensee” as the “licensee of—(A) a full-power television station; or (B) a low-power television station that has been accorded primary status as a Class A television licensee” under section 73.6001(a) of the Commission’s Rules),

³³ *Incentive Auction R&O*, 29 FCC Rcd at 6672-75, paras. 237-241. See also *Reconsideration Order*, 30 FCC Rcd at 6777-79, paras. 66-69.

³⁴ Stay Motion at 7. See Second Reconsideration Petition at 8-10.

³⁵ The Commission did state that stations that were entitled to mandatory protection (that is, stations that held full power or Class A licenses, or filed a license to cover a full power or Class A facility application, as of February 22, 2012) would receive protection for their modified facilities if the modification was licensed by the Pre-Auction Licensing Deadline. See *Incentive Auction R&O*, 29 FCC Rcd at 6656, para. 195. The Commission also stated that four named full power stations that held construction permits with pre-February 22, 2012 issuance dates but post-February 22, 2012 expiration dates would have to be licensed by the Pre-Auction Licensing Deadline in order to be protected. See *Incentive Auction R&O*, 29 FCC Rcd at 6656, para. 196, 6717, para. 353. These circumstances did not apply to out-of-core Class A-eligible LPTV stations, however. The Commission previously addressed why such stations are unlike the four named full power stations. See *Incentive Auction R&O*, 29 FCC Rcd at 6671 n.725.

³⁶ *Incentive Auction R&O*, 29 FCC Rcd at 6718 n.1053 (“[W]e will not protect LPTV stations that were eligible for a Class A license but that did not file an application for such license until after February 22, 2012. Although such entities may hold Class A licenses before the Pre-Auction Licensing Deadline, their facilities will not be protected in the repacking process, and thus the spectrum usage rights covered by such facilities will not be recognized for relinquishment.”).

³⁷ Courts are “generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.” *Covad Comm’s Co. v. FCC*, 450 F.3d 528, 541 (D.C. Cir. 2006) (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998)); see also *NASUCA v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004).

stations would be eligible for protection if the Commission decided to protect formerly out-of-core Class A-eligible LPTV stations that obtained Class A licenses after February 22, 2012.³⁸ This attempt is unlikely to succeed because this argument does not bear on the decisional issue presented by the Second Petition for Reconsideration – the reasonableness of the Commission’s decision to protect only a subset of those stations, specifically, Class A stations that demonstrated efforts to obtain Class A status before the enactment of the Spectrum Act by filing a FCC Form 302-CA application. In any event, Movants’ complaint that the Commission “has never offered support” for its estimate that there were approximately 100 stations lacks merit.³⁹ The Commission explained that stations in the relevant category can be identified by searching its publicly-available Consolidated Database System (“CDBS”).⁴⁰ Movants recently submitted an analysis of the data in CDBS in support of the Second Reconsideration Petition that demonstrates that any interested party can identify the stations in question using publicly-available data.⁴¹

13. Fourth, Movants are unlikely to succeed on their claims that the Commission exceeded its authority on reconsideration by dismissing or denying the 2014 Petitions while extending protection to other stations that did not seek reconsideration, and arbitrarily discriminated against them by protecting the other stations but not theirs.⁴² In clarifying that out-of-core Class A-eligible stations that had a Class A construction permit application pending or granted as of February 22, 2012 and now hold a Class A license are not entitled to mandatory repacking protection,⁴³ the Commission was not acting under its reconsideration authority.⁴⁴ In any event, in extending discretionary protection to these stations,⁴⁵ the Commission acted well within its authority on reconsideration. The issue of which Class A stations to protect in the repacking process was squarely within the scope of the *Incentive Auction NPRM*, and the 2014 Petitions broadly asked the Commission to reconsider the scope of discretionary protection for out-

³⁸ Stay Motion at 7; see *Incentive Auction R&O*, 29 FCC Rcd at 6671, para. 234.

³⁹ Stay Motion at 7.

⁴⁰ *Reconsideration Order*, 30 FCC Rcd at 6770 n.194. Specifically, the Commission explained that interested parties can search CDBS for out-of-core Class A-eligible LPTV stations—that is, LPTV stations that operated on out-of-core channels before enactment of the Community Broadcasters Protection Act of 1999 whose certifications of eligibility for Class A status were granted in 2000—that obtained in-core channel authorizations but did not apply for a license to cover an authorized Class A facility until after February 22, 2012. *Id.*

⁴¹ See Videohouse, Abacus, WMTM, and KMYA Comments to Filings in Support of Petition for Reconsideration, GN Docket No. 12-268 (filed Nov. 17, 2015). The submission lists 965 LPTV stations whose Class A eligibility certifications were accepted in 2000, categorizes them according to what Petitioners view as their current status—auction-eligible, cancelled, downgraded, or licensed as LPTV—and shows their current channels and whether they were formerly on out-of-core channels. Because Petitioners categorized stations differently, their analysis does not match the Commission’s estimate of approximately 100 stations, but their analysis does reflect at least 55 stations in the relevant category: Class A-eligible stations that they categorize as “LP Licensed” (i.e., Class A-eligible) and show as having moved from an out-of-core to an in-core channel. That figure excludes numerous stations included in the Commission’s estimate based on the methodology in the *Reconsideration Order*, however. For example, Petitioners categorize certain stations as “[d]owngrad[ed]” to LPTV status (presumably meaning that they have abandoned all claims to Class A eligibility or whose Class A status has been rescinded) which remain Class A-eligible, e.g., Facility ID numbers 586, 16540, and 28328. And Petitioners’ “licensed as low power” and “downgraded” categories both include stations that moved from an out-of-core to an in-core channel but are not shown as such, e.g., Facility ID numbers 28943 (channel 66 to channel 25), 51470 (59 to 38), 477 (62 to 48), and 14678 (66 to 14).

⁴² Stay Motion at 8-9. See Second Reconsideration Petition at 10-14.

⁴³ See *Reconsideration Order*, 30 FCC Rcd at 6769, para. 53.

⁴⁴ The Commission may act on its own motion to issue such a declaratory ruling removing uncertainty at any time. See 47 C.F.R. § 1.2. See also 47 U.S.C. § 554(e).

⁴⁵ See *Reconsideration Order*, 30 FCC Rcd at 6774, para. 62.

of-core Class A-eligible LPTV stations that now hold Class A licenses.⁴⁶ Finally, the Commission clearly explained why the protected Class A stations were different from the Movants' stations.⁴⁷ It also explained that the licensees of the protected Class A stations might have failed to seek reconsideration of the *Incentive Auction R&O* because they reasonably believed their stations were protected under that order.⁴⁸ For all of these reasons, Movants have failed to demonstrate a likelihood of success on the merits.

B. Movants Will Not Suffer Irreparable Injury

14. Movants also have failed to prove that they will suffer irreparable injury absent a grant of the Stay Petition.⁴⁹ Movants maintain that, "[a]fter January 12, 2016, Movants will be foreclosed from participating in the reverse auction and thus will be unable to 'return some or all of their broadcast spectrum usage rights in exchange for incentive payments.'"⁵⁰ However, if Movants were to prevail on the merits of their claims after January 12, 2016, appropriate relief would be available for them at a later date.⁵¹ For example, if the Commission were to rule in their favor before the auction commences, it could take appropriate action to ensure that the Movants have an opportunity to submit an application to participate in the reverse auction. If the Commission or a court were to rule in their favor after the auction commences, the Commission could devise other appropriate relief as necessary.⁵²

15. Movants also claim that, "after January 12, 2016, [they] will forever lose their existing spectrum rights, as they are likely to be displaced with little chance of securing a replacement channel following the post-auction repack."⁵³ This allegation lacks merit for several reasons. First, the January 12 deadline will have no bearing on Movants' ability to receive repacking protection. A station need not participate in the reverse action in order to be protected in the repacking process. If the Commission or a court determines that Movants should be protected in the repacking process, the Commission will be able to take appropriate action to protect them. Moreover, the repacking process will not be finalized until

⁴⁶ 2014 Petitions at 7 (asking the Commission to "exercise its discretion to ensure that similarly situated entities are not subject to arbitrarily disparate treatment"). See *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997) (The Commission is "free to modify its rule on a petition for reconsideration as long as the modification was a 'logical outgrowth' of the earlier version of the rule . . . and provided the agency gave a reasoned explanation for its decision that is supported by the record.") (citations omitted); *Globalstar, Inc. v. FCC*, 564 F.3d 476, 485 (D.C. Cir. 2009) ("[O]nce Globalstar petitioned for reconsideration of the 2004 Order, the Commission was free to reconsider the entire record dating back to the 2003 NPRM and to modify the spectrum plan 'provided [it] gave a reasoned explanation for its decision that is supported by the record.'" (citations omitted)).

⁴⁷ See *Reconsideration Order*, 30 FCC Rcd at 6774-75, para. 62; *id.* at 6673-74, para. 60.

⁴⁸ See *id.* at 6774-75, para. 62 n.228.

⁴⁹ Several general principles govern the irreparable injury inquiry. First, "the injury must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). A movant must also "substantiate the claim that the irreparable injury is 'likely' to occur. . . . Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." *Id.* Further, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Id.* The only exceptions to this rule are when (1) the economic loss threatens the "very existence of the movant's business," *id.*, and (2) such loss is great, certain, and imminent. *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211 (D.D.C. 2012).

⁵⁰ Stay Motion at 2 (citation omitted). See *id.* at 4, 9.

⁵¹ See *VA Petroleum Jobbers*, 259 F.2d at 925 ("The possibility that adequate . . . relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

⁵² See *FCC v. Radiophone, Inc.*, 516 U.S. 1301, 116 S.Ct. 283 (1995) (Justice Stevens vacating a stay of an auction, stating that "allowing the national auction to go forward will not defeat the power of the Court of Appeals to grant appropriate relief in the event that respondent overcomes the presumption of validity that supports the FCC regulations and prevails on the merits").

⁵³ Stay Motion at 2. See *id.* at 4-5, 9.

after bidding in the incentive auction closes, which will not transpire for many months, and stations will not actually begin transitioning to new channels until after the auction closes. Thus, the harm Movants' allege is not imminent.

16. Second, Movants' assertions that they are likely to be harmed if they are not protected are wholly speculative. The likelihood of displacement depends on factors such as broadcaster participation levels in the reverse auction, the amount of spectrum that the auction clears, the individual channel reassignments made to repacked broadcasters, and whether auction closing conditions are satisfied. Movants offer no basis to conclude that these factors will result in the displacement of their stations.⁵⁴ In the event that Movants' stations are displaced, they will have an "advanced opportunity" to file a displacement application during the post-auction transition, thereby maximizing their chances of securing replacement channels.⁵⁵ In addition, the stations would not be required to cease operations until a new licensee commences operations on their current channels, providing opportunities for them to find new channels that may last several years.⁵⁶ Also, the Commission has proposed to allow Class A stations to enter into channel sharing arrangements outside the auction context.⁵⁷ If adopted, this proposal will open additional opportunities for Movants to find new channels if they are displaced.

C. The Requested Stay Will Result in Harm to Others and is Contrary to the Public Interest

17. Movants have failed to demonstrate that the requested stay will not harm third parties and will serve the public interest.⁵⁸ Contrary to their suggestion, granting the relief they request necessarily would disrupt the auction schedule. In order to ensure the stability of the auction system, the Commission has frozen the list of broadcast television licensees eligible to file applications to participate in the reverse auction as of October 15, 2015.⁵⁹ Any modifications to the list at this stage would entail system modifications that would impact the overall schedule for the auction. Delay would be disruptive for prospective, eligible applicants who have developed business plans based on the current schedule.

18. Delaying the auction also would disserve the public interest. As the Commission explained in the *Incentive Auction NPRM*, "[o]ur country faces a major challenge to ensure that the speed, capacity, and accessibility of our wireless networks keeps pace with these demands in the years ahead, so the networks can support the critical economic, public safety, health care, and other activities that increasingly rely on them. Meeting this challenge is essential to continuing U.S. leadership in technological innovation, growing our economy, and maintaining our global competitiveness."⁶⁰

⁵⁴ See *Power Mobility Coal. v. Leavitt*, 404 F.Supp.2d 190, 205 (D.D.C. 2005) (a "predict[ion]" that is "at best, remote and speculative" does not merit a finding of irreparable harm).

⁵⁵ *Incentive Auction R&O*, 29 FCC Rcd at 6671, para. 234. See also *id.* at 6794, para. 554 and 6795, para. 556.

⁵⁶ See *id.* at 6835, para. 657.

⁵⁷ See *Channel Sharing By Full Power and Class A Stations Outside the Broadcast Television Spectrum Incentive Auction Context*, GN Docket No. 12-268, MB Docket No. 15-137, Notice of Proposed Rulemaking, 30 FCC Rcd 6668 (2015). Movants' stations are now Class A stations, though, as explained above, they did not seek or achieve that status at the relevant time to receive discretionary repacking protection.

⁵⁸ Stay Motion at 10 (stating that Movants do not seek to stop the auction from starting on March 29, 2016 and that the goals of the auction will be served by allowing them to participate).

⁵⁹ See *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016, Technical Formulas for Competitive Bidding*, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, Public Notice, DA 15-1183, para. 2 (WTB rel. Oct. 15, 2015). On November 12, 2015, OET and MB issued corrected baseline data for several stations, *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction, Announces Revised Filing Window Dates*, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, Public Notice, DA 15-1296 (rel. Nov. 12, 2015), but did not change the list of eligible stations.

⁶⁰ *Incentive Auction NPRM*, 27 FCC Rcd at 12358, para. 1.

Accordingly, the Commission has moved ahead with this first-of-its-kind auction with all deliberate speed.⁶¹ Delaying the auction until all reviews and appeals are final would not be justified by rule or precedent and would be inconsistent with Congress's goals in enacting the Spectrum Act.⁶²

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 4(i), 4(j), 5, 301, 303, and 309 of the Communications Act of 1934, as amended, and Sections 6402 and 6403 of Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, 47 U.S.C. §§ 151, 154(i)-(j), 155, 301, 303, 309, 1452, and the authority delegated pursuant to Sections 0.61 and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61, 0.283, this Order Denying Stay Motion in GN Docket No. 12-268 IS ADOPTED.

20. IT IS FURTHER ORDERED that the Emergency Motion for Stay and Other Relief filed by The Videohouse, Inc., Fifth Street Enterprises, LLC, and WMTM, LLC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief
Media Bureau

⁶¹ *Incentive Auction R&O*, 29 FCC Rcd at 6573, para. 13.

⁶² See *Genesis Communications I, Inc.*, Memorandum Opinion and Order, 29 FCC Rcd 4214, 4215, para. 3 (2014) (“[T]here is no rule or case support for the claim that auction or post-auction procedures must be delayed until all reviews and appeals are final.”). See also 47 U.S.C. § 309(j)(3)(A) (directing the Commission to design auctions in order to, *inter alia*, promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays”).